OBERTHUR TECHNOLOGIES OF AMERICA CORPORATION, Respondent and LOCAL 14M, DISTRICT COUNCIL 9, GRAPHIC COMMUNICATIONS CONFERENCE/ INTERNATIONAL BROTHERHOOD OF TEAMSTERS, Charging Party	Case Nos. 04-CA-128098 04-CA-132055 04-CA-134781 04-CA-158860

CHARGING PARTY'S BRIEF IN SUPPORT OF EXCEPTIONS TO THE DECISION OF THE ADMINISTRATIVE LAW JUDGE

Pursuant to Section 102.46 of the Board's Rules and Regulations, 29 C.F.R. § 102.46, charging party Local 14M, District Council 9, Graphic Communications Conference/International Brotherhood of Teamsters ("Union") submits this brief in support of its exceptions to the decision of Administrative Law Judge Arthur J. Amchan in the above-captioned matter.

I. INTRODUCTION

In this case, the Board must decide whether an employer has a meaningful duty to bargain with its employees' union prior to imposing discretionary disciplinary discharges on those employees. Judge Amchan found that respondent Oberthur Technologies of America Corporation made a discretionary decision to discharge four of its employees at various points in 2014 and 2015, thereby changing the employees' terms and conditions of employment. The Judge found that respondent did not give the Union, which represents the employees, notice or an opportunity to bargain over the changes at any point. Although Judge Amchan concluded that respondent's actions violated Sections 8(a)(5) and (1) of the Act, he failed to (1) hold that respondent was required to bargain with the Union *prior* to discharging the employees, instead

indicating that respondent could have met its statutory obligations through post-imposition bargaining; (2) order respondent to reinstate the employees and provide them with backpay; and (3) order respondent to reimburse the employees for the expenses they incurred while searching for work following their discharges. The Union excepts to these aspects of the Judge's decision.

It is axiomatic that an employer may not make discretionary changes to employees' terms and conditions of employment without first giving the employees' representative notice and an opportunity to bargain. This duty to bargain is not satisfied if the employer implements the changes and then attempts to bargain with the union about them after they are already in place. Although the Judge found that respondent changed the employees' terms and conditions by discharging them, he indicated that respondent could have satisfied its duties under the Act by bargaining with the Union after imposing the discharges. This aspect of the Judge's decision is contrary to Board precedent and the Act.

The Judge also erred in constructing a remedy. The proper remedy for the respondent's unilateral changes includes restoration of the *status quo ante* in place before the unlawful changes, meaning reinstatement of the employees with backpay. Contrary to the Judge's decision, Section 10(c)'s prohibition on reinstatement and backpay for employees discharged "for cause" does not apply to this case because these employees were not discharged "for cause." The Board has held that a discharge is only "for cause" when it is clear that the employee's misconduct would have warranted discharge even in the absence of the employer's unfair labor practice. Here, the respondent's unfair labor practice was failing to bargain with the union over what discipline these employees' alleged misconduct warranted. It necessarily follows that it is not clear that the alleged misconduct would have warranted discharge had the respondent bargained as required by the Act—perhaps the parties would have agreed that lesser or no

discipline was appropriate. Therefore, the employees were not discharged "for cause," and Section 10(c) does not apply.

II. STATEMENT OF THE CASE

A. History of the bargaining unit

Respondent operates a facility in Exton, Pennsylvania at which it manufactures credit cards, debit cards, smart cards, governmental identifications, and related products. On September 7, 2012, the Board conducted a secret-ballot election to determine whether a stipulated unit of employees at that facility wished to be represented by the Union. A determinative number of ballots were challenged. (GC Exh. 2).

On February 20, 2013, Judge Raymond P. Green determined that a majority of eligible voters had cast ballots in favor of the Union (GC Exh. 2). On March 11, 2013, the Union sent a letter to respondent stating that "any unilateral changes by the Company pertaining to terms and conditions of employment or with respect to the issuance of discipline without first providing the Union with notice and the opportunity to bargain over those changes is an attempt to unlawfully change, alter or eliminate those terms and conditions of employment and will be met by the Union pursuing legal remedies" (GC Exh. 2(a)). Respondent replied via a letter dated March 15, 2013 that "the ALJ's decision is not final and the Company has no obligation to bargain until" the resolution of respondent's intended appeal (GC Exh. 2(b)).

On August 27, 2015, the Board agreed with Judge Green regarding resolution of the Union's challenges and certified the Union (GC Exh. 2). On September 1, 2015, the Union sent another letter to respondent demanding to bargain (GC Exh. 3). On September 22, 2015, respondent sent a letter in reply stating its "inten[tion] to challenge the Board's decision with regard to the certification" and categorically declaring that it "will not negotiate [with the Union]

unless and until this matter is finally resolved on appeal" (GC Exh. 4). Respondent has in fact never recognized nor bargained with the Union regarding any topic (Tr. 23).[1]

B. Discipline by respondent

Respondent maintains an "Employee Handbook" (GC Exh. 12), which is the only written statement of its disciplinary policies (Tr. 84-85). The handbook contains a section entitled "Standards of Conduct" that lists 56 broad types of behavior that will prompt discipline "as the Company may determine, ranging from counseling to dismissal" (GC Exh. 12 at p. 25). The policy further states that the "Company reserves its right to demote, transfer, suspend, terminate or otherwise discipline any employee without prior warning should the Company, in its sole discretion, believe such action is warranted or appropriate" (GC Exh. 12 at p. 28).

The handbook contains a section called "Violence in the Workplace" that prohibits "attempts or threats of physical violence" and declares that "[a]ny violation of this policy will result in disciplinary action, as the Company may determine in its sole discretion, ranging from verbal counseling to immediate dismissal" (GC Exh. 12 at pp. 28-29). Another section bars harassment and states "[w]here the Company has determined that conduct in violation of this policy has occurred, the Company will take appropriate disciplinary action" (GC Exh. 12 at 11-15).

When respondent suspects that an employee has engaged in misconduct, a representative from respondent's human resources ("HR") department conducts an investigation (Tr. 88). The HR representative then ordinarily meets with the direct manager of the employee involved and discusses how to respond to the situation, which response "[d]epend[s] on the facts" (Tr. 89). However, the structure of the investigatory and decision-making process is ultimately up to the

[1] Citations to the transcript of the hearing before Judge Amchan will appear as "Tr." followed by the relevant page number.

HR representative, who decides how to proceed after "look[ing] at the facts of the case and the conduct" (Tr. 90). Sometimes the HR representative meets with other members of management in addition to the employee's direct manager (Tr. 107). The HR representative and the consulted managers then make a determination about what level of discipline to impose (Tr. 95, GC Exh. 15). Management personnel sometimes disagree about what discipline is appropriate (Tr. 95; GC Exh. 13). Decisions to discharge are not made until the end of meetings, after a full evaluation of the particular facts at hand (Tr. 107; GC Exh. 13).

C. Discharges of Albert Anderson, Harvey Werstler, Dan Clay, and Lawrence Bennethum

Respondent terminated bargaining unit member Albert Anderson and another employee on February 4, 2014, alleging that they had operated a forklift in an unsafe manner (Tr. 51). Respondent did not notify the Union prior to discharging Anderson or the other employee, nor did it notify the Union of the discharges after the fact. The Union learned of the discharges from Anderson himself after the discharges had been imposed. (Tr. 27). Respondent has not discharged every employee who behaved in an unsafe manner (Tr. 86; 110). Instead, respondent has required retraining, counseling, or coaching in response to such behavior. Respondent's reaction depends on its assessment of the particular facts at issue, including the nature of the safety violation. (Tr. 110).

Respondent discharged bargaining unit members Harvey Werstler and Dan Clay on July 14, 2015 (Tr. 30-31) for allegedly having a heated altercation with one another at work that included shoving (Tr. 78). Respondent did not provide the Union with any notice of the discharges at any point. The Union learned of the discharges from Werstler after the fact. (Tr. 31).

Respondent discharged bargaining unit member Lawrence Bennethum on July 22, 2015 for allegedly making a racially insensitive comment (Tr. 34; 60-61). Again, respondent did not provide the Union with any notice of the discharge at any point. The Union learned of the discharges from Bennethum after the fact. (Tr. 34-35). Respondent has not discharged every employee who made inappropriate or offensive racial or sexual remarks to another employee. In particular, respondent imposed a three-day suspension on an employee who asked another employee if the other employee was the "head nigger in charge" (Tr. 87). HR Director Kurt Johnson ("Johnson") testified at hearing that another management official had led the handling of this incident and that Johnson disagreed with that official's decision to impose a three-day suspension as opposed to more severe discipline (Tr. 96). Another employee who made sexually suggestive comments to a coworker received a final warning (87-88).

D. Judge Amchan's decision

The Union filed charges alleging, *inter alia*, that respondent violated Sections 8(a)(5) and (1) of the act by discharging Anderson, Clay, Westler, and Bennethum without providing it notice or an opportunity to bargain. The Regional Director for Region 4 issued a Consolidated Complaint and Notice of Hearing on October 27, 2015. A hearing was held before Judge Amchan on April 13, 2016.

Judge Amchan issued his decision in this matter on June 16, 2016. The Judge declined to apply the rationale adopted by the Board in *Alan Ritchey*, 359 NLRB No. 40 (2012) because the United States Supreme Court subsequently held that the Board that decided *Alan Ritchey* lacked the requisite quorum, in *NLRB v. Noel Canning*, 134 S.Ct. 2550 (2014) (ALJD at 6). However, he determined that each of the discharges was "discretionary"—which he interpreted as "the opposite of 'Automatic'"—because respondent "clearly reserved the right to impose lesser forms

of discipline." He stated that if *Alan Ritchey* did apply to this case, he "would find that Respondent violated the Act by failing to notify the Union in advance and offering it the opportunity to bargain over the 4 discharges herein." (ALJD at 7.)

The Judge then found that, even setting *Alan Ritchey* aside, respondent violated Sections 8(a)(5) and (1). The Judge explained that "[t]he imposition of discipline, particularly the termination of an employee[,] is an obvious change in that employee's working conditions" and that "[a]n employer has an obligation to bargain with the Union, upon request, concerning disciplinary matters, even if it has no obligation to notify and bargain to impasse with the Union before imposing discipline." The Judge concluded that the respondent "violated Section 8(a)(5) and (1) by failing to provide notice and an opportunity to the Union to bargain over the terminations in this case—at any time." (ALJD at 7.)

Regarding the remedy, the Judge determined that "an employee who has not engaged in protected activity and is discharged for misconduct is not entitled to a make whole remedy" under Section 10(c) of the Act. In support of this interpretation, the Judge cited decisions indicating that Section 10(c) bars reinstatement and backpay for employees whose misconduct is detected as a result of unfair labor practices, such as through interrogations conducted in violation of *Weingarten v. NLRB*, 420 U.S. 251 (1975) or through surveillance systems installed unilaterally. The Judge concluded that "the consequences of failing to bargain over these discharges is limited by Section 10(c) to the posting of a notice." (ALJD at 9).

The Judge declined to consider whether respondent was obligated to reimburse the employees for expenses they incurred searching for work during the period after their discharges, finding that existing precedent did not permit him to order such reimbursement as an independent aspect of an award and that he was bound by existing precedent (ALJD at 6 fn. 4).

III. QUESTIONS INVOLVED

1. Did the Judge err by failing to find that respondent was required to give the Union notice and an opportunity to bargain *prior* to discharging the employees (this question relates to the Union's first exception)?

2. Did the Judge err by concluding that Section 10(c) of the Act prohibited a remedy that included reinstatement and backpay (this question relates to the Union's second exception)?

3. Did the Judge err by failing to order respondent to reimburse the employees for expenses they incurred searching for work during the period following their discharges regardless of whether the employees received any interim earnings during that period?

IV. ARGUMENT

A. The Judge erred by failing to find that respondent was required to give the Union notice and an opportunity to bargain *prior* to imposing the discharges

The Board has long held that, once employees choose to be represented by a union, the employer must bargain over discretionary changes to terms and conditions of employment prior to implementing those changes. *Oneita Knitting Mills*, 205 NLRB 500, 500 (1973); *accord, Adair Standish Corp.,* 292 NLRB 890 fn. 1 (1989), *enfd. in relevant part,* 912 F.2d 854 (6th Cir. 1990); *Eugene Iovine*, 328 NLRB 294, 294 (1999); *Washoe Medical Center, Inc*., 337 NLRB 202 (2001). Here, respondent's discharges of all four employees were discretionary changes to the employees' terms and conditions made without first giving the Union notice and an opportunity to bargain (ALJD at 7). Therefore, respondent violated Sections 8(a)(5) and (1) by imposing the discharges without first providing the Union notice and an opportunity to bargain. *See, e.g., Oneita*, *supra* at 500.

However, the Judge concluded that under prevailing Board law, respondent was permitted to discharge employees without giving the Union prior notice and an opportunity to bargain, provided it gave such notice and opportunity post-imposition. Respondent's violation, the judge explained, was failing to bargain with the Union over the discharges at any time. (ALJD at 7).

In *Alan Ritchey*, 359 NLRB No. 40 (2012), the Board clarified that its longstanding rule requiring an employer to provide prior notice and an opportunity to bargain before discretionarily changing terms and conditions applied to discretionary suspensions and discharges. *Id.*, slip op. at 2. However, the Supreme Court held in *NLRB v. Noel Canning*, 134 S.Ct. 2550 (2014), that the Board that decided *Alan Ritchey* lacked the necessary quorum for effective action. Citing *Noel Canning*, Judge Amchan refused to apply *Alan Ritchey* to the present matter (ALJD at 6). The Union excepts to this refusal and urges the Board to apply the principles articulated in *Alan Ritchey* to the present case.

But even setting aside *Alan Ritchey*, the Judge erred by concluding that respondent had no duty to give the Union notice and an opportunity to bargain prior to imposing the discharges. *Alan Ritchey* did not establish a pre-imposition duty to bargain, it only clarified and refined that duty. Thus, in *Washoe Medical Center*, the complaint alleged, *inter alia*, that the employer had violated the Act by disciplining employees without giving the union prior notice and an opportunity to bargain. Although the Board dismissed this portion of the complaint because the union never "sought to engage in such before-the-fact bargaining," it specifically stated that *Oneita*'s holding requiring an employer to bargain over discretionary changes before implementing them extends to discretionary discipline. 337 NLRB at 202 fn. 1. Thus, if an employer's existing disciplinary policies and procedures allow for discretion, the employer must

provide the union with notice and an opportunity to bargain before exercising that discretion. *Ibid.*

Here, the Union demanded that the Employer give it "notice and the opportunity to bargain" over "the issuance of discipline" prior to the imposition of such discipline, thereby satisfying a prerequisite for establishing an employer's pre-imposition bargaining obligation under pre-*Alan Ritchey* standards (GC Exh. 2(a)). *Washoe*, *supra* at 202 fn. 1. And, as the Judge correctly found, respondent "clearly reserved the right to impose lesser forms of discipline" on the four employees in question, and their discharges were therefore discretionary (ALJD at 7). Thus, pursuant to *Washoe* and *Oneita*, respondent was obligated to bargain with the Union *prior* to discretionarily changing these employees' terms and conditions by discharging them. *Ibid.*; *Oneita*, *supra* at 500.

The Judge apparently concluded that *Fresno Bee*, 337 NLRB 1161 (2002), permitted respondent to satisfy its duty to bargain by offering to do so after the discharges were already imposed (ALJD at 7). This is not correct. In *Fresno Bee*, the Board acknowledged that:

> Employee discipline, regardless of how exhaustively codified or systematized, requires some managerial discretion. The variables in workplace situations and employee behaviors are too great to obviate all discretion in discipline.

Id. at 1186. The Board, therefore, concluded that where an employer has "detailed and thorough written discipline policies and procedures" and the employer simply applies "its preexisting employment rules or disciplinary system in determining discipline," the employer is not obligated to give the union prior notice and an opportunity to bargain, even if the discipline involves some theoretical amount of unavoidable discretion. *Ibid.*

Fresno Bee, which did not overrule *Washoe*'s pronouncement that an employer must bargain over discretionary discipline prior to imposing it, merely holds that where pre-

established policies and practices effectively dictate the appropriate discipline to be applied to a given factual scenario, the employer's retention of some theoretical amount of discretion does not obligate it to bargain prior to the imposition of discipline. In other words, more than that theoretical amount of discretion inherent in all employee discipline is required for a particular instance of discipline to be considered "discretionary" within the meaning of *Oneita* and its progeny so as to require pre-imposition bargaining. *Fresno Bee*'s holding is, therefore, narrow.

Fresno Bee is distinguishable from the present case. There, the employer "maintain[ed] detailed and thorough written discipline policies and procedures" and adhered to them; although the employer, despite having "exhaustively codified [and] systematized" its disciplinary system, may have retained "a degree of discretion," the discipline to be imposed was essentially dictated by the pre-established policies and practices and was not truly "discretionary" so as to require pre-imposition bargaining. The *Fresno Bee* employer may have exercised some theoretical amount of discretion over discipline, but the proper discipline to be determined was in effect dictated by the elaborate written policies and procedures, and the discipline was therefore not a change requiring bargaining. Here, on the other hand, respondent had a single written policy regarding discipline in the form of an employee handbook, and that policy gave it unlimited discretion to determine the nature of discipline or even whether to impose any discipline at all (ALJD at 4-6, 7). And respondent in fact exercised unlimited discretion over discipline in practice, with the discipline to be imposed determined based on the subjective judgment of management (Tr. 88-90). The discharges of the four employees at issue therefore constituted changes to terms and conditions, and respondent was obligated to bargain prior to implementing them. *Washoe*, *supra* at 202 fn. 1; *Oneita*, *supra* at 500.

B. The Judge erred by failing to order that respondent reinstate Anderson, Clay, Werstler, and Bennethum and provide them with backpay

The proper remedy for respondent's unilateral changes to the employees' terms and conditions includes restoration of the *status quo ante* in place prior to the changes, which in this case means reinstatement with backpay. "Pursuant to the Board's established policy, in cases…involving a violation of Sec[tion] 8(a)(5) based on an employer's unilateral alteration of terms and conditions of employment, it is customary to order restoration of the status quo ante to the extent feasible." *Detroit News, Inc.*, 319 NLRB 262, 262 fn. 1 (1995). Accordingly, "traditional[ly]," where an employer has unilaterally changed terms and conditions of employment, the Board "requir[es] the [employer], upon request from the Union, to reinstate unlawfully changed terms and conditions of employment and to make whole employees for monetary losses, if any, resulting from those changes." *Martin Marietta Energy Sys.*, 316 NLRB 868, 869 fn. 5 (1995). And, in the particular circumstance where the Employer's unilateral changes have resulted in the discharge of an employee, the Board orders that the employee "be reinstated with full backpay." *Storer Communications, Inc.*, 297 NLRB 296, 299 (1994) (employee discharged pursuant to a unilaterally implemented drug and alcohol policy ordered reinstated with full backpay).

Here, because respondent unilaterally altered terms and conditions of employment by discharging the four employees without giving the Union prior notice and an opportunity to bargain, it is required to "restor[e]…the status quo ante" by "reinstat[ing] [the discharged employees] with full backpay." *Detroit News*, *supra* at 262 fn. 1; *Storer*, *supra* at 299.

Respondent and the Union may then commence bargaining regarding the potential discharges in accordance with the Act.[2]

The Judge erroneously concluded that Section 10(c) of the Act prohibited a remedy that included reinstatement with backpay for the discharged employees (ALJD at 9). Section 10(c) grants the Board "broad discretionary" power to "devis[e] remedies to effectuate the policies of the Act." *NLRB v. Seven-Up Bottling Co.*, 344 U.S. 344, 346 (1953). However, it contains the proviso that: "No order of the Board shall require the reinstatement of any individual as an employee who has been suspended or discharged, or the payment to him of any back pay, if such individual was suspended or discharged for cause." 29 U.S.C. § 160(c). Section 10(c) does not bar the Board from ordering reinstatement with backpay any time employees have committed arguably wrongful actions, and there are many situations in which the Board does order such a remedy where the employees have engaged in misconduct.[3] *E.g., Uniserve*, 351 NLRB 1361, 1361 fn. 1 (2007) (reinstatement and backpay for employees who failed drug tests and were discharged pursuant to an unlawfully unilaterally adopted "zero tolerance" policy); *Consec Security*, 328 NLRB 1201, 1201 (1999) (reinstatement and backpay for discharged employee whose action might not have merited discharge absent the employer's unlawful unilateral change in conduct rules); *Business Products– Division of Kidde, Inc.*, 294 NLRB 840, 840 fn. 3, 852

[2] The Board contemplated reinstatement with backpay as part of the remedy in *Alan Ritchey*, when it decided not to apply its decision retroactively because "retroactive application of our holding could well…*expose* [*many employers*] *to significant financial liability insofar as discharges and other disciplinary actions that could trigger a backpay award are involved*." *Alan Ritchey, Inc.*, *supra*, slip op. at 11 (2012) (emphasis added).

[3] The Board has emphasized that Section 10(c) does not call on the Board to perform an arbitration-style analysis in each case to determine whether the employee in question did or did not engage in misconduct and whether that misconduct rose to the level of "cause" for discharge or suspension. *Taracorp Ind.*, 273 NLRB 221, 222 fn. 8 (1984) ("It is important to distinguish between the term 'cause' as it appears in Sec 10(c) and the term 'just cause,' which is a term of art traditionally applied by arbitrators in interpreting collective-bargaining agreements.").

(1989) (reinstatement and backpay for employee whose "misconduct [was] discovered during an investigation undertaken because of [the] employee's protected activity); *Kolkka Tables & Finnish-American Saunas*, 335 NLRB 844, 849–851 (2001) (backpay for suspended employee whose insubordination was provoked by the employer's unfair labor practices). In other words, a finding that an employee has engaged in misconduct does not mean that the employee was discharged "for cause." *Ibid.*

The Board has explained that an employer does not have "cause" to discharge an employee who has engaged in misconduct when "it is not clear that the conduct of [the] employees…would have constituted cause for discharge" absent the employer's unfair labor practice. *Uniserv*, *supra* at 1361 fn. 1; *Anheuser-Busch, Inc.*, 344 NLRB 644, 649 (2007) (distinguishing cases where "it is not clear whether the employees' actions would have been wrongful or would have merited the discipline imposed—that is, whether the employees' actions would have constituted 'cause' for discipline—if the employer had not committed the unfair labor practices" from those where "it is clear that the employees' actions were wrongful and would have merited the discipline imposed—that is, the employees' actions constituted cause for discipline—regardless of whether the Respondent had" committed the unfair labor practice). The Board has held that even where the employee misconduct at issue would be considered serious by most observers, and even where it might have warranted discharge absent the employer's unfair labor practice, the employee was still not discharged "for cause" if it is not certain that the employee would have been discharged. *See Uniserv*, *supra* at 1361 fn. 1 (Section 10(c) did not bar reinstatement and backpay to employees who used illegal drugs and who might have been discharged under the discretionary policy existing prior to the employer's unilateral change).

Thus, where an employer has discharged an employee for misconduct and committed a related unfair labor practice, the Board imagines that the employer had acted lawfully, then asks whether, in that counterfactual realm, it is *clear* that the employee's *misconduct* would have merited discharge. If it is not clear, and only possible, then the employee was not discharged "for cause," and Section 10(c)'s proviso does not apply. Here, respondent violated Sections 8(a)(5) and (1) by failing to bargain over whether the employees' misconduct merited discharge. Imagining that respondent had bargained with the Union as required by the Act, it is obviously entirely possible that respondent may have determined that the employee actions merited only lesser discipline or no discipline—this is the point of bargaining. Therefore, "it is not clear that the conduct of [the[employees…would have constituted cause for discharge" absent the employer's unfair labor practice. *Uniserv*, *supra* at 1361 fn. 1. "Accordingly, a make-whole remedy for these employees is warranted"—the employees were not discharged "for cause" and Section 10(c)'s proviso does not apply.[4]

The Judge erroneously relied on the Board's rule that Section 10(c) bars reinstatement and backpay for employees' whose misconduct is *discovered* through investigatory interviews conducted in violation of *Weingarten v. NLRB*, 420 U.S. 251 (1975) or through unlawfully unilaterally installed surveillance equipment, *Anheuser Busch*, *supra* at 650. The Board's reasoning in distinguishing those cases in *Uniserv* is instructive:

[4] Although in other contexts, such as where an employer has discharged employees pursuant to unilateral work rules, the Board permits an employer subject to a make-whole order to attempt to prove at the compliance stage that the employee would have been discharged even under the prior rules, *Uniserv*, *supra* at 1361 fn. 1, the Board no longer permits an employer who has refused to bargain to attempt to prove what the parties would have agreed to had it met its duty to bargain under the Act. *Pressroom Cleaners*, 361 NLRB No. 57, slip op. at 6 (2014). Therefore, if the Board issues reinstatement with backpay, respondent will not be permitted to argue in compliance that it would never have agreed to anything less than discharge had it met its duty to bargain under the Act. *Ibid.*

> [In *Anheuser-Busch, Inc.*, 351 NLRB 645 (2007)], the respondent employer's unlawful unilateral change was to its method for detecting [the type of misconduct at issue, which was drug use]. There was no change in the discipline meted out for [that misconduct]; thus, [the misconduct] constituted "cause" for the discipline imposed. Here, by contrast, the Respondent unilaterally adopted a [policy stating that the misconduct merited automatic discharge]. In these circumstances, it is not clear that the conduct of employees discharged under the [new] policy would have constituted cause for discharge under the Respondent's previous discretionary policy. Accordingly, a make-whole remedy for these employees is warranted.

Id. at 1361 fn. 1. Thus, applying the test to determine whether an employer has been disciplined "for cause" to an employee whose misconduct is discovered through an unlawful investigatory interview, one imagines the counterfactual that the employer had not conducted the interview, then asks whether the *misconduct* would still have constituted grounds for discharge; the answer is yes—the employer's unfair labor practice did not call the discipline the *misconduct* warranted into question, only whether the employer would have uncovered that misconduct's existence. The same is true where the employer *discovers* the misconduct through unlawful surveillance. This is contrasted with the present case, where respondent's refusal to bargain over what, if any, discipline the alleged misconduct merited makes it unclear that the misconduct would have warranted discharge had respondent complied with the Act. *Anheuser Busch*, *supra* at 649.[5] The

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[5] As the *Anheuser Busch* majority itself explained:

> The dissent cites several situations where the Board has granted a make-whole remedy to employees who have committed arguably wrongful actions. These cases are distinguishable because it is not clear whether the employees' actions would have been wrongful or would have merited the discipline imposed—that is, whether the employees' actions would have constituted "cause" for discipline—if the employer had not committed the unfair labor practices. By contrast, in the instant case, it is clear that the employees' actions were wrongful and would have merited the discipline imposed—that is, the employees' actions constituted cause for discipline—regardless of whether the Respondent had unlawfully implemented the hidden camera surveillance.

Ibid. (internal footnote omitted).

Weingarten cases and *Anheuser Busch* are therefore distinguishable, and Judge Amchan erred by relying on them.

C. The Judge erred by failing to award search-for-work expenses

The Judge declined to consider whether respondent was obligated to pay for discriminatees' expenses while searching for work regardless of whether the employees received interim earnings while they were discharged, finding that the Counsel for the General Counsel was calling for a change in Board precedent and that he was bound by that precedent (ALJD at 6 fn. 4). For the reasons articulated by Counsel for the General Counsel in his brief to Judge Amchan (Counsel for General Counsel's Post-Hearing Brief to the ALJ at 24-27), the Union agrees that such expenses should be awarded here, and that the Board should no longer treat such expenses as an offset to an unlawfully discharged employee's interim earnings.

V. CONCLUSION

For the foregoing reasons, Judge Amchan erred by failing to find that respondent was required to bargain with the Union *prior* to discretionarily discharging Albert Anderson, Dan Clay, Harvey Werstler, and Lawrence Bennethum. He also erred by failing to order that respondent rescind the unilateral discharges, provide backpay, provide search-for-work expenses, and otherwise restore the *status quo ante* in place prior to its unilateral changes.

Respectfully submitted,

s/ Richard H. Markowitz
s/ Thomas H. Kohn
s/ Mark Kaltenbach

MARKOWITZ & RICHMAN
123 S. Broad Street, Suite 2020
Philadelphia, PA 19109
Counsel for Charging Party